Supreme Court, U.S.
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No. 99-1328

In The

Supreme Court of the United States

DiMa CORP.,

Petitioner,

v.

THE TOWN OF HALLIE, WISCONSIN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF RESPONDENT TOWN OF HALLIE IN OPPOSITION TO PETITION

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STATEMENT OF THE CASE BY THE TOWN OF HALLIE

DiMa Corporation (DiMa), the petitioner, owns and operates the "Pure Pleasure" adult bookstore in Hallie, Wisconsin. Pure Pleasure sells sexually explicit, non-obscene, books and magazines. In March, 1998, Hallie enacted a municipal ordinance which regulates adult-oriented establishments, including "adult bookstores" like Pure Pleasure. App. 2.

Hallie's ordinance regulates adult-oriented establishments in various ways but the petitioner challenges only one of its provisions; the hours of operation limitation found at Section 1.06. Under that section, an adult-oriented establishment may not be open between 2:00 a.m. and 8:00 a.m. on Monday through Friday, between 3:00 a.m. and 8:00 a.m. on Saturday, and between 3:00 a.m. and noon on Sunday. App. 2. These are the same limits for hours of operation placed on establishments that serve alcohol in Wisconsin. App. 2. Petitioner claims that § 1.06 infringes on its right to free speech under the First Amendment by preventing Pure Pleasure's storefront from being open for business on a 24 hour a day basis.

SUMMARY OF ARGUMENT BY THE TOWN OF HALLIE

The Town of Hallie has general municipal power to regulate activities protected by the First Amendment when the legislative objective lies within its legitimate sphere of regulatory power, when the regulation furthers an important governmental interest, when the government interest is unrelated to suppressing the content of the regulated material and when the restriction on alleged First Amendment rights is essential to furtherance of that interest. Hallie has the specific authority to impose reasonable time, place and manner restrictions on protected speech, provided the restrictions can be

legally justified. Hallie ordinance § 1.06, the hours of operation provision, is justified because the town board relied on evidence from other communities which shows the adverse secondary effects that are associated with purveying sexually explicit material.

ARGUMENT BY THE TOWN OF HALLIE FOR DENYING PETITION

When the federal district court initially reviewed Hallie's motion for summary judgment, it correctly concluded that Hallie ordinance § 1.06, the hours of operation provision, is a content-neutral time, place, and manner restriction on protected speech. (i.e., sexually explicit expression). That holding relied upon the Supreme Court's decision in *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), with interpretative guidance from Justice Souter's concurring opinion in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991). The district court specifically found that the Fifth, Sixth and Eleventh Circuits also follow Justice Souter's concurrence in *Barnes*. *See, J & B Entertainment, Inc. v. City of Jackson*, 152 F.3d 362 (5th Cir. 1998); *Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129 (6th Cir. 1994); *International Eateries of America, Inc. v. Broward County*, 941 F.2d 1157 (11th Cir. 1991). The Third and Eighth Circuits do the same. *See, Phillips v. Borough of Keyport*, 107 F.3d 164, 175 (3rd Cir. 1997); and, *Farkas v. Miller*, 151 F.3d 900, 904 (8th Cir. 1998).

Affirming dismissal of DiMa's § 1983 action, the Seventh Circuit ruled that Hallie ordinance § 1.06 is content-neutral under the same Supreme Court precedent cited to by the district court. *Renton* and *Barnes* say that governmental regulation of adverse secondary effects associated with the public sale of sexually explicit materials is constitutionally acceptable because those restrictions are *deemed* to be content-neutral.

Petitioner does not argue that the Seventh Circuit erred in finding that § 1.06 is a time, place and manner restriction on speech. Rather, petitioner complains that the Seventh Circuit reached its conclusion without performing a proper factual analysis of the ordinance's enactment. First, says petitioner, the Seventh Circuit impermissibly declined to consider the legislative motives of Hallie town board members who promulgated the ordinance. Second, says petitioner, the Seventh Circuit wrongly determined that Hallie's legislators could rely upon the experience of the City of West Allis, Wisconsin, in enacting the hours of operation provision. Third, says petitioner, the Seventh Circuit should have considered evidence produced by DiMa which claimed no "adverse secondary effects" resulted from operating Pure Pleasure's storefront 24 hours a day.

With respect to the first issue, the Seventh Circuit agreed with DiMa that some town board members may have had motives that differed from the legislative intent espoused by the language of the ordinance. However, it also found that the actual motives of those who voted for the ordinance were irrelevant to a constitutional analysis of § 1.06. "[I]n analyzing whether Hallie's ordinance violates the First Amendment, we do not ask whether the motives of the Board can be justified as content-neutral time, place and manner restrictions, but rather whether the ordinance itself can be so justified. See *Renton*, 475 U.S. at 48." App. 9.

Regarding the second issue, petitioner maintains that the Seventh Circuit improperly deferred to the legislative judgment of Hallie board members rather than requiring "evidentiary justification" for the ordinance's hours of operation section. The Seventh Circuit, relying on the Supreme Court's decision in *Renton* found that in responding to a First Amendment challenge, the municipality bears the burden of showing that there is some evidence which supports its proffered justification. In

reality, this is not a particularly onerous burden for municipalities to meet. Here, the Seventh Circuit held that, "The First Amendment does not require a city before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as *whatever* evidence the city relies upon is *reasonably believed* to be relevant to the problem that the city addresses." (Citing to *Renton*). App. 10. (Italics added).

Under that standard and relying upon Justice Souter's concurring opinion in *Barnes*, the Seventh Circuit determined that Hallie had done enough to show it reasonably relied upon the experience of other Wisconsin cities when promulgating the town's adult-oriented establishments ordinance. The Seventh Circuit cautioned other municipalities not to read its decision too broadly since for other cases a greater record might be required to justify similar regulatory measures.

On the third and last issue, the Seventh Circuit implicitly decided that regulation of adverse secondary effects is not *a priori* dependent upon a municipality suffering from such conditions. Combating the known secondary adverse effects associated with the sale of sexually explicit materials is a significant and well-established governmental interest. Petitioner maintains that the reasons cited by Hallie for an hours of operation restriction are a sham because none of the community's fears are borne out by actual negative experiences stemming from operation of the Pure Pleasure store. However, in *Renton*, the Supreme Court authoritatively held that communities are entitled to rely on the experiences of *other* cities in determining whether regulation is appropriate for them.

The legitimacy of Hallie's regulation of the Pure Pleasure has been conceded by the petitioner. DiMa admits that adverse secondary effects are not only associated with its business but are also severe enough to warrant

some governmental regulation. Petitioner's only complaint about Hallie's ordinance is that it cannot have its storefront open 24 hours a day.

Ordinances restricting the hours of operation in adult-oriented establishments have often been upheld by federal courts. *See, Tee & Bee, Inc. v. City of West Allis*, 936 F.Supp. 1479, 1492 (E.D. Wis. 1996). [Citing to *Star Satellite, Inc. v. City of Biloxi*, 779 F.2d 1074 (5th Cir. 1986) and *Broadway Books, Inc. v. Roberts*, 642 F.Supp. 486 (E.D. Tenn. 1986).] In *Richland Bookmart, Inc. v. Nichols*, 137 F.3d 435 (6th Cir. 1998), the Sixth Circuit found it was reasonable for Tennessee state lawmakers to believe, based upon the experience of other communities, that restricting the hours of operation for businesses selling sexually explicit material tends to *deter* adverse secondary effects caused by those enterprises. *See, Richland Bookmart* at 440-441. It is no different for Hallie's lawmakers.

The Seventh Circuit correctly recognized that deterrence and prevention are logical goals for the type of regulations at issue in this case. Therefore, any evidence from DiMa that "it hasn't happened here yet" is irrelevant to the issue of preventative governmental regulation for the Town of Hallie.

CONCLUSION

Petitioner fails to state a compelling reason for reviewing the Seventh Circuit's decision in this case. Accordingly, the petition for writ of certiorari should be denied.

Dated this 8th day of March, 2000.

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